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SUPREME COURT, U.S.

80-6758

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM 1981

BRIAN MILLER,

PETITIONER,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT.

BRIAN MILLER
#79B875 D-5/42
135 STATE STREET
AUBURN, NEW YORK
13021

PRO SE ACTION

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STATE OF NEW YORK)
S.S.:
COUNTY OF CAYUGA)

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRIAN MILLER, the petitioner, first being duly sworn, deposes and says:

1. That he is the petitioner in the annexed petition for a Writ of Certiorari, pursuant to the appliable provision of this Court's Rules of procedure.

2. That with the permission of this Court, the petitioner would pray to proceed IN FORMA PAUPERIS within the meaning of TITLE 28 U.S.C. 1915.

3. That he, petitioner, is a poor person, within the meaning of TITLE 28 U.S.C. 1915, without the necessary funds from family or friends, to pre-pay the cost of the filing of this petition for a Writ of Certiorari, and that as a poor person, the petitioner seeks the possession of this Court to be allowed to proceed IN FORMA PAUPERIS.

W H E R E F O R E, the petitioner prays, that as a poor person he be allowed to proceed before this Court IN FORMA PAUPERIS without first being required to pre-pay the cost thereof.

Respectfully submitted,

s/ Brian Miller

Brian Miller
#79B875 D-5/42
135 State Street
Auburn, New York
13021

Sworn to before me
this 14th day of April, 1981.

s/ John D Cowen

Notary Public
JOHN D. COWEN NO. 15[illegible]
NOTARY PUBLIC, STATE OF NEW YORK
RESIDING IN CAYUGA COUNTY
MY COMMISSION EXPIRES MARCH 30, 19[illegible]

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM 1981

BRIAN MILLER,

PETITIONER,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

RESPONDENT.

PROCEEDINGS

The proceeding sought to be reviewed by this petition for Writ of Certiorari, commenced in the Supreme Court of Erie County, State of New York, by the filing of an indictment (Ind. No. 43-781).

The petitioner is the only party to this proceeding.

There was no opinion rendered in the Appellate process of this criminal action. The only written opinion for review before this Court was rendered in the trial Court, and is annexed as exhibit (a). The affirmance order of the Appellate Division Fourth Judicial Department of the State of New York, stated that "...judgment so appealed from be and the same hereby is unanimously affirmed (see People v. Graham, 76 A.D.2d 228)." The Court of Appeals of the State of New York gave no written opinion. Therefore, the basis for this petition is upon the written Memorandum orders of the trial court in this matter.

PRELIMINARY STATEMENT

This petition is based upon an appeal from a judgment of conviction of the Supreme Court, Erie County, State of New York, before the Honorable Leon N. Armer, Justice, entered on the 23rd day of May,1979, upon a plea of guilty.

The petitioner, Brian Miller, upon the indictment of the Erie County Grang Jury was charged with one count of ARSON in the SECOND DEGREE (P.L. §150.15) and four counts of MURDER in the SECOND DEGREE (P.L. §125.25 (1) and (2)).*

Proceeding a HUNTLEY hearing to suppress written statements, on April 23,1979, the petitioner withdrew his previously entered plea of not guilty to the indictment and entered a plea of guilty to the reduced charges of ARSON in the THIRD DEGREE (P.L. §150.10) under count one, and MANSLAUGHTER in the SECOND DEGREE (P.L. §125.15) under the third count of the indictment. The Trial court characterized the plea exceptance as an "ALFORD PLEA."

Timely notice of appeal was filed from the State judgment of conviction.

The appeal was heard upon typewritten briefs filed in the Appellate Division Fourth Judicial Department of the Supreme Court, State of New York, upon said judgment of conviction

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(*) P.L. is reference to New York State Penal Law.

entered on April 23,1979, being unanimously affirmed on the 16th day of January,1981, upon the constrains of People v. Graham, 76 A.D.2d 228, ___N.Y.S.2d ___(1980).

Leave to appeal to the Court of Appeals was made on the 11th day of February,1981, and said leave was denied on the 23rd day of March,1981, by Associate Judge Matthew J. Jasen of the Court of Appeals, State of New York. On March 27,1981, the petitioner received through assigned counsel of the Legal Aid Bureau of Buffalo, that said leave to appeal was denied.

JURISDICTION

The judgment of affirmance entered on the 16th day of January,1981, in the Appellate Division Fourth Judicial Department of the State of New York, timely application for certificate for leave to appeal to the Court of Appeals having been denied on the 23rd day of March,1981, and received by the petitioner from assigned counsel on the 27th day of March,1981, the petition for Writ of Certiorari being filed within the sixty (60) day period of Rule 22 of the Rules of this Court, this Court has jurisdiction pursuant to §1257(3) of Title 28 of the United States Code to hear this petition.

CONSTITUTIONAL PROVISIONS

This case involves the Fourth Amendment's right to be free from illegal search and seizure; the Sixth Amendment right to counsel; and the Fourteenth Amendment's right to Due Process of Law, all within the meaning of the United States Constitution.

QUESTIONS PRESENTED

POINT I ..... THE ARREST OF THE PETITIONER WAS NOT BASED UPON PROBABLE CAUSE, ACCORDINGLY, ALL STATEMENTS EXTRACTED FROM THE PETITIONER CONSTITUTED FRUITS OF AN ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED;

POINT II ..... THE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL DURING THE INTERROGATIONS INVOLVING THE TWO STATEMENTS WAS VIOLATED, ACCORDINGLY, BOTH STATEMENTS SHOULD HAVE BEEN SUPPRESSED;

POINT III ..... THAT THE TAKING OF THE SECOND STATEMENT WAS ILLEGAL, IN THAT THERE WAS NOT A SUFFICIENT BREAK BETWEEN THE SECOND STATEMENT TO DISSIPATE THE TAINT OF THE FIRST STATEMENT, ACCORDINGLY, THE SECOND STATEMENT SHOULD HAVE BEEN SUPPRESSED.

STATEMENT OF FACTS

BRIAN MILLER, the petitioner, was arrested on December 23rd, 1977, and held in custody in connection with a fire which occurred at 277 Fillmore Street in the City of Buffalo, State of New York. During that fire, which occurred on November 12,1977, two people died.

JEROME McINTEE, a Buffalo Police Officer assigned to the District Attorney's office as an investigator, arrested the petitioner at his home on December 23,1977 (H.M. pp. 77-79).*

When Investigator McIntee went to arrest the petitioner, proportedly, armed with information consisting of two (2) signed statements and a third verbal statement that the petitioner was at the scene of the fire (H.M. pp. 53-54), the Investigator McIntee did not have an arrest warrant (H.M. p.110), or for that matter neither did he have a search warrant. The Investigator knocked at the door of 223 Paderewski Drive, Buffalo, New York, the house of the petitioner, and asked whether Brian Miller, the petitioner, was there. The reply was "no". The Investigator then entered the house of the petitioner, without a search, or arrest warrant, and without the consent of any of the occupants therein. He then proceeded to search through the house (H.M. p. 133) and arrested the petitioner in the living room (H.M. pp. 107, 133-34). The hearing minutes reveal that the pretext for entering the house was a complaint of loud noise (H.M. pp. 111, 132-33).

(*) H.M. reference to pages of suppression hearing transcripts.

According to Investigator McIntee, the petitioner had been a suspect since the day of the fire, some six weeks earlier to his arrest (H.M. p. 108). Upon arresting the petitioner and walking him out the back door of the house, Investigator McIntee advised him of his rights (H.M. p. 79). As far as Investigator McIntee could recall, the petitioner was not asked if he was willing to talk to him, or Fire Investigator Francis Haynes until they reached Police headquarters (H.M. pp. 81, 90).

Investigator McIntee and Fire Investigator Haynes while driving the petitioner to the Police headquarters, told petitioner that they had statements from two people to whom petitioner is alleged to have admitted setting the fire, and that whether petitioner wanted to talk about it, to which the petitioner responded no (H.M. pp. 38-39).

At Police headquarters, petitioner was taken to an interview room. Therein Investigator Joseph Marciniak read him the Miranda rights twice. Investigator McIntee then had petitioner read the two statements that had been mentioned in the car in route to the police headquarters (H.M. pp. 81, 83). According to Investigator Marciniak, the Miranda warnings were given after the two statements had been shown to the petitioner (H.M. p. 125).

Through continuous interrogation of the petitioner, the record of the suppression hearing reflects that the petitioner had given statements. The first statement was taken by Investigator McIntee and Fire Investigator Haynes. The second statement was taken by Investigator Detective Stanley W. Suszek and Sergeant Dove.

Investigator McIntee after hearing the first verbal statement of the petitioner, asked that he repect it, so that it could be tape recorded. At the end of the tape recording, Investigator McIntee gave the petitioner a "note" stating that he the petitioner had cooperated with the authorities in the investigation, and verbally assured the petitioner that he would try to help petitioner in the future, if, he could (H.M. pp. 84-85).

According to the arrest record, the time of petitioner's arrest was 6 P.M. (H.M. p 97). Petitioner was officially booked approximately an hour after he had been picked up, and after questioning by Investigator McIntee (H.M. p. 49).

Police officer Stanley Suazek of the Buffalo Police Department was one of the officers who was present when the petitioner was arrested at his home (H.M. p. 3). Officer Suszek, sometime around 7:30 P.M., after the first statement was taken from petitioner by Investigator McIntee, took the petitioner from the cell block to the Homicide Bureau, read the petitioner the Miranda rights and proceeded to interrogate him (H.M. p. 6). Sometime thereafter, a second statement was taken and reduced to writing. Petitioner was asked to sign the statement, but refused to do so without an attorney (H.M. p. 13).

Wayne Miller, petitioner's brother testified that he was at 223 Paderewski Drive, the home of the petitioner, on December 23, 1977. That about 6 P.M., there was a knock at the door, that he asked who was there, and the reply was "Police". That the speaker indicated that they were there on a complaint

of loud music, and that when the police entered the house, they first grabbed him, then Michael Brzozowski, asking whether they were Brian Miller, the petitioner (H.M. pp. 132-133). Mr. Miller, brother of the petitioner, further stated that one of the officers went through each room and eventually came out with petitioner (H.M. pp. 133-135).

Brian Miller, the petitioner, testified in his own behalf, that after the police knocked on the door, he was on his way towards another room to put on another record. That Investigator McIntee came up to him and asked if he was Brain Miller. When he replied that he was, Investigator McIntee told him that he had to go with him (H.M. p. 142). That he was advised of his rights outside of his house (H.M. pp. 143-144) and possibly during the trip to police headquarters (H.M. p.145). That he refused to talk to the Investigator and another officer in the car, and that he refused to sign the waiver card when he was questioned, and that twice he told Investigator McIntee he wanted an attorney (H.M. pp. 146-147).

The petitioner was not given the opportunity to call an attorney or his family (H.M. pp. 150-151).

The trial court in a Memorandum order, dated April 17,1979, held that the People had not sustained their burden of proof with respect to petitioner's first statement to Investigator McIntee and suppressed that statement accordingly. The Court in so doing, indicated that there was no satisfactory showing that petitioner knowingly and intelligently waived his right to counsel and that to some measure the waiver was the result of Investigator McIntee's menace toward and promises made to

petitioner (M.D. I. p. 2)* As to the second statement, the Court ruled that there was a sifficient break in the chain of events between the first statement to attenuate any taint which may have occurred at the time of the first statement, deeming the second statement to have been given knowingly and voluntarily (M.D. I p. 3).

Based upon a Memorandum of law submitted by counsel for petitioner, a further memorandum order was issued, dated April 23,1979, which the Court upon reconsideration of its previous memorandum dated April 17,1979, found that "...there was such definite pronounced break between the interrpgations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." (M.D. II. p. 1).

The Trial Court, also, found that upon the record, that while no arrest warrant had been issued, the officers did have the right to make the arrest pursuant to Criminal Procedure Law §140.10(1)(b); §140.15(4). That the officers had the right to make inquiry of the petitioner concerning the matter pursuant to Criminal Procedure Law §140.20(4), and that immediate arraignment could not be had pursuant to Criminal Procedure Law §140.20(1). The Trial Court also found that the petitioner was not subject to illegal detention, and that he did not desire to speak to an attorney (M,D. II. pp. 1-2).

(*) M.D. I. represents Memorandum Decision I dated April 17,1979.

POINT I

THE ARREST OF THE PETITIONER WAS NOT BASED UPON PROBABLE CAUSE, ACCORDINGLY, ALL STATEMENTS EXTRACTED FROM THE PETITIONER CONSTITUTED FRUITS OF AN ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED

The FOURTH AMENDMENT to the United States Constitution reads:

> "The right of the People to be secure in their persons...against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The petitioner contends that his arrest, without a warrant, in his residence, was illegal and without the necessary prerequisite of probable cause to justify a warrantless arrest, as a matter of Federal constitutional law.

The petitioner's arresting officer Investigator McIntee, asserted during the suppression hearing that the basis for the arrest was upon the three statements of three individuals which contained hearsay admissions by the petitioner, that he had started the fire which took the lives of two individuals.

With nothing more then the fact that the petitioner was indeed at the party the night of the fire, the Police had no evidence which served to link the petitioner to the crime. These elements are in and of themselves insufficient to establish probable cause to arrest.

The standard of reasonableness as an ingredient of probable cause govern both Federal and State activities (see: Ker v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964)).

Because of the exclusionary sanction, the FOURTH AMENDMENT is more commonly thought of as a limitation on the power of the Police to search for and seize evidence, instrumentalities, and fruits of crime. However, an illegal arrest or unreasonable seizure of the person is itself a violation of the Fourth and Fourteenth Amendments (see: Terry v. Ohio, 392 U.S. 1 (1968); Henry v. United States, 361 U.S. 98 (1959)).

Initially, it must be pointed out that the existence of probable cause is the sine qua non of any arrest, with or without a warrant. It is the entry into the home for the purpose of arrest that requires, in addition to probable cause absent exigent circumstances, a warrant or consent (cf., Payton v. New York, U.S. ,100 S.Ct. 1371 (1980).

In this case, Investigator McIntee, entered the petitioner's house under the pretext that there was a loud party going on. Investigator McIntee, when asked about the ruse of a loud party, stated the following:

> "Q. Isn't it also a fact, Sir, that at the time you approached the house you notified the occupants that you'd received a complaint of a loud party in there ?
>
> A. I don't recall.
>
> Q. Could it be ?

A. Might have been, I don't know.

Q. Was this a ruse you used to get inside the house ?

A. Might have been, I don't know. I don't recall it, I told you counsel.

Q. As a matter of fact, nobody came and opened the door for you, did they ?

A. No, the door was open.

Q. You just went in, right ?

A. No. Somebody answered the door. We asked if Brian Miller was there, and he said, "No." And then we went in.

Q. No one said come on in, did they ?

A. I don't believe so, no, sir." (H.M. p.111).

An overall reading of the suppression hearing transcripts of this case, clearly, reflect that the totality of the circumstances did not warrant entry into petitioner's home, since (1) the police did not have probable cause; and, (2) there were no exigent circumstances to justify such entry for purposes of arrest of the petitioner.

This Court in Fourth Amendment cases has seemingly approached its review of a given case by a review of the totality of the circumstances, and that that review has taken place in the context of some definitive thoughts on what may constitute a compelling need for official action (e.g., danger to human life or property, the escape of the suspect, and the destruction of evidence).

A clear question of constitutional law is reflected in this case: DO THE FACTS REVEAL A COMPELLING NEED FOR OFFICIAL ACTION AND NO TIME TO SECURE A WARRANT FOR ARREST ? (cf., e.g.,

Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

The arresting officer in this case, when asked whether he or any other officer made an application for a warrant of arrest of the petitioner, he stated "No" (H.M. p. 110), and when asked why, he stated, "It wasn't necessary" (H.M. p.110). It is important to note that the officers did not state their true purpose prior to the entry into petitioner's home. Instead, they relied upon a subterfuge - a complaint of loud music.

Giving the benefit of the doubt, arguendo, that the police in this case had probable cause to arrest the petitioner, there was no reason why the police could not have obtained an arrest warrant. The arrest in question took place during early evening hours of a weekday when it would not have been difficult to locate a Judge to obtain one. There were no "exigent circumstances" which would have justified a warrantless arrest. First, the crime was then some six weeks old; second, there existed no physical evidence that may or could have been destroyed; and, third, the police were no pursuing an armed suspect. And furthermore, the police had no information that there was a likelihood that the petitioner would have fleed, if not swiftly apprehended.

Under New York Law, Criminal Procedure Law §140.15 subd.(4) applies to warrantless arrest situations, and substantially juxtaposes the exigent circumstances requirement setforth in C.P.L.§120.80 subd.(4) for arrest with a warrant.

The Trial Court held that "While the officer had no arrest warrant, they did have the right then and there to make

the arrest (CPL §140.10 subd.(1)(b), §140.15 subd.(4)), they then being in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers" (M.D. I. p. 2). The basic crux of New York's C.P.L. §140.10 subd.(1)(b), that a police officer "...has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise", does not, in this case, give rise to the justification for the arrest upon a warrantless entry under the totality of the circumstances.

This Court has held:

> "(F)or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." (Payton v. New York, supra. at 1388).

But knowing when an arrest warrant can legally be obtained and when, with a warrant, officers may enter a suspect's home does not answer the questions of when in a given investigation a warrant should be sought and whether from that point, or perhaps during the period a warrant is being sought, the exigencies of the situation mandate that the police proceed without obtaining the warrant (cf., Wallace v. King, F.2d. (4th Cir. 1980)(arrest and search warrant); United States v. Arboleda, F.2d (2nd Cir. 1980)(arrest warrant)).

The record clearly shows that this was a "planned arrest", or one made in the course of an on-going investigation, and the only evidence sought of a non-tangible nature was that of which came forth from the petitioner's mouth: a confession!

In this case, the officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. There were no tangible goods seized, nor in existence, which could be deemed in the process of destruction, or about to be removed from the jurisdiction (see: e.g., Vale v. Louisiana, 399 U.S. 30 (1970); Warden v. Hayden, 387 U.S. 294 (1967); United States v. Santana, 427 U.S. 38 (1976)).

In conclusion, this case reflects nothing more than the officers attempt to circumvent the warrant requirement of the Criminal Procedure Law of New York State, in having the determination of probable cause judged by a detached magistrate, rather than based upon the actions and opinion of a police officer who is engaged "...in the often competitive enterprise of ferreting out crime"(see: Johnson v. United States, 333 U.S. 10, 14 (1948)). Since the exigencies of the situation did not make the course of action taken in this case imperative (cf., McDonald v. United States, 335 U.S. 451, 456 (1948)). Exigent circumstances as an exception cannot be showing, nor be the basis for the illegal entry into the petitioner's home to effectuate an arrest.

In light of these factors, and since Payton controls the circumstances of this case, all statements obtained from the petitioner after his illegal arrest should have been suppressed.

POINT II

THE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL DURING THE INTERROGATIONS INVOLVING THE TWO STATEMENTS WAS VIOLATED, ACCORDINGLY, BOTH STATEMENTS SHOULD HAVE BEEN SUPPRESSED

Under the circumstances of this case, petitioner's inculpatory statements should have been suppressed because the People of the State of New York did not establish beyond a reasonable doubt that they were voluntarily given (see: Miranda v. Arizona, 384 U.S. 436 (1966); People v. Huntley, 15 N.Y.2d 72, 78 (1965)). Furthermore, the petitioner's right to counsel attached during the first interrogation, by virtue of the Trial Court's ruling that it should be suppressed as being involuntary.

Petitioner was arrested and taken into custody on December 23,1977, in connection with a fire that claimed the lives of two individuals. From the point of the arrest of petitioner at his home, to the point of arrival at the Police Headquarters, the record in this case reveals testimony of such a contradictory nature, that it borders on perjury.

First, as the record reads, the order of witnesses for the People do not constitute the order of events that took place in the arrest of the petitioner.

Firemen Francis J. Haynes of the Buffalo New York Fire Department, Engine 10 Company and Investigator Jerome McIntee of the Buffalo District Attorney's Office were the individuals that took the petitioner into custody (H.M. pp. 36-

37, 78-79).

Detective Stanley W. Suszek of the Buffalo, New York Police Department and Firemen Joseph Marciniak of the Buffalo, New York Fire Department were are the home of the petitioner when the arrest took place (H.M. pp. 4, 121-123).

HAYNES and McINTEE were involved in the first interrogation of the petitioner, which was suppressed by the Trial Court (H.M. pp. 34-76; 77-113).

SUSZEK and Sergeant DOVE were involved in the second interrogation of the petitioner, which the Trial Court allowed into evidence against the petitioner (H.M. pp. 2-34)*

During both interrogations of the petitioner, he indicated that he desired an attorney (H.M. pp. 146-147).

Clearly, such requests precluded any questioning of the petitioner until an attorney had been assigned to him (see: People v. Cunningham, 49 N.Y.2d 203 (1980); Miranda v. Arizona, supra.).

The rule in New York is that, in the case of custodial interrogation, the People must establish beyond a reasonable doubt that MIRANDA rights were given and waived voluntarily before the introduction of a defendant's confession is permitted (see: Miranda v. Arizona, supra; People v. Yarter,

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(*) Sergeant Dove did not testify for the People, nor was he called as a witness for the petitioner.

41 N.Y.2d 830 (1977); People v. Valerius, 31 N.Y.2d 51 (1972); People v. Huntley, supra.).

Where the interrogation is custodial and it is clearly established that MIRANDA rights have been recited to the defendant, the analysis then focuses on whether the defendant voluntarily, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel (see: Miranda v. Arizona, supra at 479).

The due process clause dictates that involuntary confessions, i.e., confessions which are the product of a will which was overborne or not the product of rational intellect, are inadmissible in criminal trials (see: e.g., Lego v. Twomey, 404 U.S. 477 (1972; Jackson v. Denno, 378 U.S. 369 (1964); Brown v. Mississippi, 297 U.S. 278 (1936)).

New York State Criminal Procedure Law §60.45, codifies this rule by providing that a confession involuntarily made is inadmissible in a criminal case and defines an involuntary statement as that which is obtained in violation of constitutional mandates or by improper conduct or undue pressure which "undermine the ability to make a choice whether or not to make a statement." (see: N.Y. Crim. Proc. Law §60.45; cf., People v. Anderson, 42 N.Y.2d 35 (1977)).

The point at which petitioner was arrested without a warrant and taken into custody for questioning is the point at which his constitutional right to counsel attached. It should be held that he could not have waived this right except in the presence of an attorney, especially since the first interrogation and taking of a statement was so overborne, and which the Trial Court held "Nor can it be said on this

record on the question of the voluntariness of defendant's acts, that the evidence obtained is free from doubt that it was not in some measure the product of the menace toward and promises made to him implicit in the conduct and statement of Detective McIntee. (see: D.M. I. p. 2). Thus, petitioner's inculpatory statements were taken in violation of his constitutional right to counsel and should have been suppressed (see: N.Y. Const. Art. 1 §6; People v. Cunningham, supra; People v. Samuels, 49 N.Y.2d 218 (1980); People v. Rogers, 48 N.Y.2d 167 (1979)).

It is well settled law that the Federal Sixth Amendment guarantee of assistance of counsel attaches at all critical stages of a criminal prosecution (cf., United States v. Wade, 388 U.S. 218 (1967); Kirby v. Illinois, 406 U.S. 682 (1972)).

Because this State's Court of Appeals "has consistently exercised the highest degree of vigilance in safeguarding the right of the accused to have the assistance of counsel at every stage of the legal proceeding against him," a critical stage occurs much earlier in New York than in Federal jurisdiction (see: People v. Cunningham, supra at 207; People v Samuels, supra at 221).

An individual who is being interrogated while held in Police custody has a right to the assistance of counsel even though he is unrepresented and there has been no formal commencement of a criminal action. As the Court of Appeals noted in People v. Cunningham, supra, "when an unrepresented individual who is being held in police custody invokes his right to assistance of counsel...he is expressing his view that he is not

competent to deal with the authories without legal advise." (see: People v. Cunningham, supra at 209).

While the preeminence of Miranda v. Arizona, supra, may have obviated the need for the courts in New York to specifically state that the right to counsel attaches during a custodical interrogation, it has always existed. As in People v. Conyers, 49 N.Y.2d 174 (1980), the Court observed that recitation of Miranda warning to someone in custody "merely repeats and reiterates the promises already made by the Constitution." (see: People v. Conyers, supra at 180). In fact, even the failure of the police to recite the warnings "does not serve to prevent a suspect from relying on that promise." (Id., at 180). The only question remaining is whether the right to counsel under the specific facts of this case indelibly attaches.

It does not make sense to say that an unrepresented defendant in custody who has not requested an attorney can effectively waive his rights without the advise of counsel and at the same time say that a suspect who is represented even on an unrelated matter can waive his rights only in the presences of counsel (cf., People v. Cunningham, supra at 209; see, e.g., People v. Garofolo, 46 N.Y.2d 592, 600 (1979); People v. Rutigliano, 261 N.Y. 103, 107 (1933)).

Upon the record of this case, the petitioner asserts that he was entitled as a matter of constitutional law to the assistance of counsel, and that no waiver of that right ensued from the first interrogation to the second interrogation.

POINT III

THAT THE TAKING OF THE SECOND STATEMENT WAS ILLEGAL, IN THAT THERE WAS NOT A SUFFICIENT BREAK BETWEEN THE SECOND STATEMENT TO DISSIPATE THE TAINT OF THE FIRST STATEMENT, ACCORDINGLY, THE SECOND STATEMENT SHOULD HAVE BEEN SUPPRESSED

One hour after petitioner's arrest, he was booked by McIntee and taken to a cell block within the Police Headquaters. McIntee then left police headquarters after filing his reports and leaving a copy for the Homicide Squad (H.M. pp. 103, 104). Investigator McIntee, while not being sure, conceded that he probably handed a copy of his report to either Sergeant Dove or Detective Suszck, the two homicide detectives who had accompanied him during the petitioner's arrest (H.M. pp. 104, 105). Investigator McIntee believed that his report given to Dove or Suszek did indicate he had taken a statement from the petitioner (H.M. p. 104).

The record reflects that at approximately 7:30 p.m., Dove and Suszek brought the petitioner down from the cell block to their office where Suszek read petitioner his Miranda rights (H.M. p. 6).

The Trial Court suppressed the first statement taken from the petitioner by McIntee and Haynes, but as to the second statement given to Dove and Suszek, the Trial Court held:

> "The statement given to them bears no taint from the prior conduct of McIntee since it was a detached, free and rational choice of defendant, under circumstances so removed from McIntee's apparent improper acts, as to be an independant act of defendant." (M.D. I. P. 3).

In a further finding upon a motion submitted by petitioner's trial counsel for reconsideration of the ruling as to the second statement, the Trial Court held:

> "This Court thereupon finds in the event that such finding is not deemed to have been heretofore made, that there was such a definite pronounced break between the interrogations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning..."(Citation omitted)(M.D. II.p. 1).

At the outset, the petitioner was neither released from custody, nor had he been taken before a magistrate for arraignment, or removed from the building and influence of the police officers that participated in his arrest and first statement.

The Trial Court's holding "...that there was such a definite pronounced break between the interrogations..." is totally unsupported by the record in this case. First, the taint of the first interrogation cannot be said to have dissipated to such a degree to constitute a sufficient purging of the primary taint (see: e.g., Wong Song v. United States, 371 U.S. 471, 487-488 (1963)).

One need not argue by analogy to the search and seizure language of the "fruit of the poisonous tree" doctrine to apply it to a Miranda violation. Miranda is based on the Fifth Amendment's privilege against self-incrimation, and a body of law has developed regarding the fruits of such violations which makes it even more emphatic that the doctrine is applicable.

At best the period between the first interrogation and taking of the statement is but fifteen to thirty minutes.

This being the case, upon the facts of this case, then the second statement taken from the petitioner by Suszek and Dove cannot be deemed to have been sufficiently removed by time, or intervening events, so as to attenuate the taint of McIntee's conduct in obtaining the first statement. To be purged of the primary taint of McIntee's interrogation in the first statement, the elements of attenuation constituting sufficient breaking of the taint upon the second must be something more than a period of 15 to 30 minutes (see, e.g., Killough v. United States, 315 F.2d 241 (1962)).

Accordingly, the second statement should have been suppressed.

CONCLUSION

T H E R E F O R E, the petitioner prays that this Honorable Court grant his petition for a writ of certiorari upon the issues sotforth heretofore.

Respectfully submitted,

Brain Miller
#79B875 D-5/42
135 State Street
Auburn, New York
13021

Sworn To Before Me This
19th Day of May, 1981
John D Cowen

JOHN D. COWEN NO. 1915
NOTARY PUBLIC STATE OF NEW YORK
RESIDING IN CAYUGA COUNTY
MY COMMISSION EXPIRES MARCH 30, 1982

BM/rs

Form 1. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., SIMONS, HANCOCK, CALLAHAN, MOULE, JJ.

People of the State of New York, Respondent,

v.

Brian Miller, Appellant. 80-6758

The above named Brian Miller

having appealed to this Court from a judgment

of the Supreme Court, entered in the

Erie County Clerk's office on May 23, 1979

and said appeal having been argued by

Charles Halvorsen of counsel for appellant,

Kurt Sajda of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed (see People v. Graham, 76 AD2d 228).

Entered: JAN 16 1981

MARY F. ZOLLER, *Clerk*

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State of New York
Court of Appeals

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

BRIAN MILLER,

Appellant.

CERTIFICATE DENYING LEAVE

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 23, 19 81.

Associate Judge

*Description of Order: Order of Appellate Division, Fourth Department, entered January 16, 1981, affirming Supreme Court, Erie County, judgment entered May 23, 1979.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v.

BRIAN MILLER

Defendant

EDWARD C. COSGROVE, District Attorney
(Barry A. Zavah of counsel)
for the People

DENNIS DENNY and RICHARD SULLIVAN
for Defendant

MEMORANDUM

ARMER, J.

By memorandum of April 17, 1979 suppression of a statement claimed made by defendant was denied. A memorandum of law was subsequently received from defendant, and the authorities cited therein. are noted, examined by this court, and its prior findings reconsidered.

This court thereupon finds in the event that such finding is not deemed to have been heretofore made, that there was such a definite pronounced break between the interrogations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questionin (People v. Chapple, 38 NY2d 112, 115). This was not his first contact with police (cf. U.S. ex rel B. v. Shelly, 430 F 2d 215, 219) Defendant

was not the subject of illegal detention (cf People v. Kocik, 63 AD2d 230, ; 407 NYS2d 929, 931). He did not indicate a desire to speak to a lawyer (cf People v. Jackson, 41 NY2d 146, 148; People v. Grant, 45 NY2d 366). Defendant was unquestionably well acquainted with his Miranda rights at the time of the second questioning having heard them many times prior thereto (cf People v. Johnson, 45 NY2d 519, ; 408 NYS2d 519, 523). Matter of Osualdo M., 409 NYS2d 152 is not germane to the issue here present.

Suppression continues denied.

Dated: April 23, 1979
Buffalo, New York

Leon N. Armer

LEON N. ARMER
Justice of Supreme Court

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v.

Indictment 43,781

BRIAN MILLER

Defendant

EDWARD C. COSGROVE, District Attorney
(Barry A. Zavah of counsel)
for the People

DENNIS DENNY and RICHARD SULLIVAN
for Defendant

MEMORANDUM

ARMER, J.

Defendant has moved to suppress certain statements purportedly obtained from him relative to an indictment pending charging murder, second degree and other charges. Suppression of the statement obtained by Detective Jerome McIntee of the District Attorney's Office was granted from the bench. Decision was reserved as to a statement claimed subsequently taken by members of the Homicide Squad of the Buffalo Police Department.

Upon the evidence produced, this court finds and determines as follows:

On November 12, 1977 two persons died in a fire at 277 Fillmore Street in the City of Buffalo. At about 5:20 p.m. on December 23, 1977

defendant was arrested in a private residence, apparently his home, by Detective McIntee and others. While the officers had no arrest warrant, they did have the right then and there to make the arrest (CPL 140.10[1b] 140.15[4]), they then being in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers. Since the Buffalo City Court, the applicable local criminal court, was not then sitting, immediate arraignment could not be had (cf CPL 140.20 [1]), and the officers did have the right, within constitutional limits, to make inquiry of defendant concerning the matter (CPL 140.20 [4]). At the time of his arrest, defendant had been drinking and while Detective McIntee unquestionably repeatedly gave defendant his Miranda warnings, there is, on the totality of the evidence, no satisfactory showing that defendant knowingly, intelligently and voluntarily waived his right to have an attorney present at that questioning, although this court does specifically find that at no time thereat did defendant request the presence or assistance of counsel." Nor can it be said on this record on the question of the voluntariness of defendant's acts, that the evidence obtained is free from doubt that it was not in some measure the product of the menace toward and promises made to him implicit in the conduct and statement of Detective McIntee.

While the proof thereon does reflect overtones to the effect that defendant was not only well aware of what he was doing, but indeed toying with his interrogators to seek advantage for himself, the People have failed, as concerns this statement to sustain the burden of proof imposed upon them.

At about 7:30 p.m. on the same day a considerable period of time after the close of the first interrogation, Detectives Dove and Suszek of the Homicide Squad removed defendant from his cell and questioned defendant. He was again fully advised by them of his rights. These officers conscientiously honored the burdens imposed upon police by Miranda and related cases and law and made certain that he understood these rights and waived the same before proceeding. There is no indication that at that time he was under the effects of any intoxicating materials imbibed by him earlier in the day and this court finds that he was not. He waived his right to decline or refuse to speak on the subject at hand, as well as his right to have an attorney present while speaking. He made no claim of threats or promises directed to him by Suszek and Dove, and indeed none were made by them. The statement given to them bears no taint from the prior conduct of McIntee since it was a detached, free and rational choice of defendant, under circumstances so removed from McIntee's apparent improper acts, as to be an independent act of defendant. He was uninfluenced thereby insofar as his speaking to Dove and Suszek is concerned. This statement was therefore not the product of any unlawful or unconstitutional act of any public servant.

While suppression of a second statement obtained by police might follow as a matter of course when a first statement is obtained on findings of violation of the rights of an accused, it does not necessarily follow upon, as here, findings of no more than failure by the prosecution to meet its initial burden of coming forward with evidence of viability of the admissions claimed made.

Suppression is denied.

Submit order.

Dated: April 17, 1979
Buffalo, New York

/s/LEON N. ARMER

LEON N. ARMER
Justice of Supreme Court

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

September, 1981

No. 80-6758

ORIGINAL COPY

BRIAN S. MILLER
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON A PETITION FOR A
WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, ERIE COUNTY

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

North Carolina v. Alford, 400 U.S. 25

Payton v. New York, 445 U.S. 573

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People v. Graham, 76 AD2d 228

IN THE
SUPREME COURT OF THE UNITED STATES

September, 1981

No. 80-6758

BRIAN S. MILLER
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON A PETITION FOR A
WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, ERIE COUNTY

Petitioner was indicted on March 16th, 1978; charged with four counts of Murder in the Second Degree (New York Penal Law §§125.25 subd. 2 & 3) and one count of Arson in the Second Degree (New York Penal Law §150.15). Subsequently, Petitioner moved to suppress two statements made by him on the evening of his arrest. After a hearing, held pursuant to People v. Huntley, 15 NY2d 72, the trial court granted the suppression of the first statement made by Petitioner, but denied the motion

as to the second later statement. Petitioner then entered a plea of guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, to the reduced charges of Arson in the Third Degree (New York Penal Law §150.10-1) and Manslaughter in the Second Degree (New York Penal Law §125.25-1) and was sentenced on May 23rd, 1979. On appeal, the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, by Order, dated January 16th, 1981, (79 AD2d 1092), citing People v. Graham, 76 AD2d 228; unanimously affirmed Petitioner's judgment of conviction. Leave to Appeal to the Court of Appeals of the State of New York was denied on March 23rd, 1981 (___ NY2d ___).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1251(3), and Rules 19(1)(a) and 22(1) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Was defendant's arrest based on probable cause and did the hearing court properly rule that his second statement to the police was admissable. Does Payton v. New York, 445 U.S. 573 compel any other result or should it be given retroactive effect?

2. Was defendant denied his right to coun el?

3. Did the defendant knowingly and voluntarily waive his right to remain silent during the second statement. Were the later admissions the product of or did they bear any taint from the prior improper police conduct?

CONSTITUTIONAL PROVISIONS

The Petitioner raises issues involving the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT

(Numbers in parentheses refer to page minutes of the Huntley Hearing proceeding held on March 28 and 29, 1979.)

On December 23rd, 1977, Fire Investigators Jerome McIntee and Francis Haynes received information from three sources that the defendant had intentionally started a fire which occurred at 277 Fillmore Avenue in the City of Buffalo. During that fire, which occurred on November 12th, 1977, two people died (50-53).

That information consisted of two signed statements and a third, verbal, statement such that McIntee and Haynes knew that the defendant "... was at the scene. We knew that he had stated to three people that he did the fire, and that he did want to talk about it, and he was having trouble sleeping" (53).

According to McIntee, the defendant had been a suspect since the day of the crime, some six weeks earlier (108).

A matter of hours after obtaining the two signed statements, Haynes and McIntee went to the defendant's residence at 223 Paderewski Drive in Buffalo accompanied by Buffalo Police Homicide Detectives Suszek and Dove and Fire Investigator Joseph Marciniak (3, 70).

McIntee knocked on the door and someone answered. McIntee asked if the defendant was there and was told "No" (111). However, McIntee had information that the defendant was there; he entered the house and found the defendant, who was then arrested and handcuffed (37, 106). McIntee admitted that he might have used a complaint of a loud party as a ruse to get into the house, but couldn't recall (111). As the defendant was being

handcuffed, McIntee told him the charges were arson and murder and advised him of his rights (78, 79).

They walked outside and into an alleyway, where McIntee again advised the defendant of his rights (79). The defendant indicated that he understood each of them (80, 81).

The defendant was then put into a police car with Haynes and McIntee in order to be transported to Police Headquarters (80, 81). While McIntee was unable to recall for sure, Haynes remembered McIntee advising the defendant in the car for the third time of his rights (39, 80). The defendant was also advised of the three statements, shown the two written statements and asked if he wanted to talk. The defendant said no (38).

Ten minutes later, they arrived at Police Headquarters where the defendant was taken into a

conference room and given the inculpatory statements to read (40, 41). Fire Investigator Marciniak read the Miranda rights and waiver portion off a rights card to the defendant. While the defendant refused to sign the waiver of rights card, he did agree to talk to the officers (124).

The defendant then told the officers that he had set the fire, but that he didn't mean it, and didn't want anybody hurt (41, 83-85). According to Investigator Haynes, Marciniak again reread the rights card and asked the defendant to sign the waiver; which was once again refused (65, 74, 125).

Investigator McIntee then asked the defendant to repeat his story so that it could be tape recorded (84). At the end of the tape, and because the defendant was concerned that he would not be treated fairly, McIntee gave him a note stating that he had cooperated (85).

Throughout this interview, defendant never requested of McIntee that he wanted to see or consult with an attorney (86).

One hour after his arrest, which occurred at 6 p.m., the defendant was booked by McIntee and taken to a cell block. McIntee then left Police Headquarters after filing his reports and leaving a copy for the Homicide Squad (103, 104).*

At approximately 7:30 p.m., Dove and Suszek brought the defendant from the cell block to their office where Suszek read him his rights (6). This was the first time either had seen the defendant since his arrest. The defendant acknowledged his understanding of his rights, agreed to talk to them, but refused to sign a waiver card (8). Although he did not ask to speak to a lawyer, the defendant did request to call his brother and was allowed to do so (9). Defendant's

*Although he was unsure, McIntee conceded that he probably handed a copy of the report to either Dove or Suszek, the two homicide detectives who had accompanied him during the defendant's arrest (104, 105).

statement which took approximately an hour and a half to reduce to type-written form was taken as he was furnished coffee and cigarettes (9, 13). At approximately 9:10 - 9:20 p.m., the statement was completed, and the defendant read and agreed with everything contained therein but would not sign it without an attorney (24).

Because this was the defendant's first mention of an attorney in his presence, Suszek terminated the interview (24).

The defendant and his brother also testified at the Huntley hearing. Of significant difference to the police officers' testimony was the defendant's testimony that he told McIntee twice that he wanted an attorney; that he made a similar request to Suszsek after the statement was typed; and that he was not allowed to make any phone calls. In additon, defendant's brother,

Wayne Miller, testified that he did not receive a phone call from the defendant that night and that the police entry into the apartment was preceded by their telling him they were there on a complaint of loud music.

Much of the balance of both the defendant's and his brother's testimony was consistent with that of the police and fire investigators.

REASONS FOR OPPOSING THE WRIT

DEFENDANT'S ARREST WAS BASED ON PROBABLE CAUSE AND HIS SECOND STATEMENT TO THE POLICE WAS PROPERLY RULED ADMISSABLE. PAYTON V. NEW YORK, 445 U.S. 573 DOES NOT COMPEL A DIFFERENT RESULT NOR SHOULD IT BE APPLIED RETROACTIVELY.

Defendant contends that his arrest was illegal, in that the police lacked probable cause, and/or they made an unauthorized and unconstitutional entry into a private residence to effectuate the arrest, and that all his statements which followed at police headquarters thereafter should be suppressed.

In response, it is respectfully submitted that the police had probable cause to effectuate the defendant's arrest and that the manner in which they accomplished the arrest was proper.

The factors relied on by Respondent are as follows:

As the record amply demonstrates, the police had the requisite probable cause to arrest the defendant. According to Investigator McIntee, the defendant had been a suspect in the arson and resultant two homicides since the day of the fire, some six weeks earlier (108). On the day of the arrest, McIntee obtained further information, in the form of two signed statements and a third, verbal, statement from three people, to the effect that the defendant "... had stated ... that he did the fire, and that he did want to talk about it, and he was having trouble sleeping" (53).

As the hearing court properly determined these circumstances fulfilled the statutory requirement of reasonable cause which must be present when a police officer makes a warrantless arrest, §140.10-1(b) CPL, because the police were:

> "... in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers." [See p. 2, Memorandum, (Armer, J.), dated April 17th, 1979.]

Turning then to the claim that the defendant's warrantless arrest was unconstitutional as an impermissible intrusion violative of his fourth amendment rights, Respondent submits that the defendant's reliance on Payton v. United States, 445 U.S. 573, is misplaced.

Unlike the case at bar, Payton dealt only with situations where the defendant had standing to invoke the right and no consent to enter had been obtained by the police. In Payton, the warrantless non consensual entries which this Court condemned occurred under circumstances where the police knocked on an apartment door, received no response, and about 30 minutes later, used crowbars to break into the apartment, only to find no one there and seize a shell casing (defendant Payton);

and in the defendant Riddick's case, the police entered the apartment after the defendant's three year son had answered the door but before Riddick had an opportunity either to object or consent; and thereafter the police seized narcotics.

Here, independent of whose -- prosecution or defense -- testimony is believed, the circumstances of the police entry were otherwise.

Francis Haynes, fire investigator, accompanied McIntee to what McIntee believed was the apartment of Wayne Miller, the defendant's brother, at 223 Paderewski Drive (107). Haynes testified that McIntee knocked on the apartment door without saying anything and a voice told them to enter (67). Although McIntee could not recall what, if anything, he said prior to the entry, his testimony was that the door was open (111). McIntee did concede, however, that he might have said something about a complaint of a loud party.

On the other hand, defense testimony indicated that the police knock on the door was followed by Wayne Miller's response "who was it?", the reply "Police", Wayne Miller's further response, "what do you want?", and the police answer that they came for a complaint of loud music (132-133). On that basis, and in his own words, Wayne Miller stated "And then I had no reason to fear them" (133).

The apartment door was then opened and the defendant observed by the police. He was arrested, handcuffed and led from the apartment without the seizure of any evidence or an attempt by the police to elicit any statements or admissions from him.

The defendant himself testified similarly concerning the circumstances of the police entry into the apartment:

> ... they said, "Police", we had nothing to worry about, and they asked if they could come in -- or they said something about a loud party, and there was no loud party. And my brother went to the door and opened it to see what they wanted, and they just came right in.
> (emphasis added; p. 141-142)

And, as was previously noted in the Statement, supra, the defendant's inculpatory admissions were not obtained until after he had been given Miranda warnings at least 4-5 times and when he was at police headquarters.

Under these circumstances, the police obtained at least an implicit, if not an explicit, consent to the entry of the brother's apartment. The defendant's seizure, albeit warrantless, was based on probable cause and was not a pretext or prelude to the seizure of any other evidence. In sum, Payton v. United States, 445 U.S. 573 is inapplicable to the case at bar.

However, and in the event this Court should disagree, it is Respondent's position that Payton should not be applied retroactively. As the record discloses, the police here were acting in good faith and in reliance upon a statute which made it unnecessary for them to secure an arrest warrant. Johnson v. New Jersey, 384 U.S. 719, 728; People v. Graham, 76 AD2d 228.

It is Respondent's further contention, assuming arguendo that the arrest was illegal, that the defendant's second set of admissions made to Suszek and Dove should not be suppressed as "fruit of the poisonous tree".

As the hearing court properly determined, there existed a "pronounced break" between the first interrogation, (those admissions were suppressed) and the second interrogation by Suszek and Dove (those admissions were admissible) such that it could not be said that the defendant was

still under the influence of the prior questioning. Wong Sun v. United States, 371 U.S. 471. Respondent submits that the same rationale should apply with respect to the arrest, assuming that it is determined to be illegal, and the admissions which Judge Armer determined were admissible. See United States v. Crews, 445 U.S. 463.

Finally, Respondent submits that an analysis of the "arrest" issue cannot be completed without regard to the harmless error doctrine. Here, the police had probable cause to effectuate the defendant's arrest. Regardless of the manner in which they accomplished the arrest, no statements were obtained until the defendant was in police custody at headquarters. Accordingly, any illegality in the arrest must be viewed as merely harmless error.

For these reasons, the hearing court properly ruled that Petitioner's second statement, made to Suszek and Dove, was admissable.

THE DEFENDANT WAS NOT DENIED
HIS RIGHT TO COUNSEL.

Defendant also contends on this petition that he was denied his right to counsel. Defendant bases this contention on his claim, as testified to during the Huntley hearing, that during the initial questioning by McIntee, Haynes and Marciniak and then, later, when he was questioned by Suszek and Dove, that he indicated his desire to consult with an attorney. Relying on People v. Cunningham, 49 NY2d 203, defendant argues that his request for an attorney should have terminated the initial questioning and precluded any further questioning until an attorney had been provided.

In response, the People maintain that the issue presented here is one of credibility -- properly to be determined by the hearing court:

Contrary to the defendant's claim that he requested a lawyer, Fire Investigators McIntee, Marciniak and Haynes all testified that the defendant never requested or asked to consult with an attorney (46, 86, 130), during the initial questioning.

Similarly, the defendant did not request to consult with an attorney during the later questioning by Suszek and Dove (9).

Indeed, after the statement was typed and Suszek asked the defendant to sign it, the defendant's response that he would not do so without a lawyer terminated the interview (24).

Hence, the hearing court had before it conflicting versions of whether or not the defendant requested an attorney and resolved this issue favorably for the People, holding that:

> "... this court does specifically find that at no time thereat did defendant request the presence or assistance of counsel."
> Memorandum, (Armer, J.), dated April 17, 1979, p. 2.

And in its reconsidered Memorandum, dated April 23rd, 1979, the court also held that the defendant "... did not indicate a desire to speak to a lawyer (citations omitted)".

On that basis, and because the hearing court was best suited to observe the credibility, demeanor and veracity of the witnesses and their testimony, the court's determination in this regard should not be set aside by this Court.

Accordingly, the defendant was not denied his right to counsel as he never requested that right from the police officers.

THE RECORD AMPLY DEMONSTRATES THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO REMAIN SILENT DURING HIS SECOND STATEMENT TO THE POLICE. THE PRIOR IMPROPER POLICE CONDUCT HAD NO AFFECT ON THESE ADMISSIONS AS THEY WERE INDEPENDENT ACTS AND THE PRODUCT OF A DETACHED, FREE AND RATIONAL CHOICE.

Prior to making admissions to Suszek and Dove, the defendant had been given Miranda warnings on at least 4-5 occasions within an approximate three hour period of time. As the trial court properly determined, Suszek and Dove removed the defendant from his cell, fully advised him of his rights again and then

> "... conscientiously honored the burdens imposed upon police by Miranda and related cases and law and made certain that he understood these rights and waived the same before proceeding."
> [(emphasis added); p. 3, Memorandum, (Armer, J.), dated April 17th, 1979.]

That determination finds support in the record through Suszek's testimony that a.) the defendant responded yes when asked if he understood his rights (11, 12); b.) the defendant said that he would talk to Suszek and Dove (16, 17); c.) the defendant did speak with them without requesting an attorney; and d.) the defendant read the statement, agreed with everything therein, but would not sign it without an attorney, at which point the interview was terminated (24).

The hearing court also determined that this was not the defendant's first contact with police; that he was unquestionably well acquainted with his Miranda rights; and that, not only was the defendant well aware of what he was doing, he was toying with his interrogators to seek advantage for himself. [See both Memorandum, (Armer, J.), dated April 17 and 23, 1979.]

On this standard, clearly, the defendant knowingly and voluntarily waived his rights.

For the same reasons, and those which were discussed previously, Judge Armer properly determined that there was a "pronounced break" between the first admissions, which were suppressed, and those made to Suszek and Dove; that the latter admissions were not the product and bore no taint from the prior improper conduct of McIntee; and that the defendant made them as an independent act and as a "detached, free and rational choice". See Wong Sun v. United States, 371 U.S. 471.

For these reasons, the admissions made to Suszek and Dove were properly ruled admissable.

CONCLUSION

IN LIGHT OF THE FOREGOING, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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JOHN J. DeFRANKS
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June 24, 1981